No. 12199

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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Statement.

The major portion of the Government's Brief is devoted to the question whether the penal provisions of Section 715 of Title 38, U. S. C. A. (Act of March 20, 1933, 48 Stat. 11) are validly incorporated by reference into Section 697 of said Title (Act of June 22, 1944, 58 Stat. 300, as amended). But, the Government virtually ignores the equally, or more, important question that even if it be assumed that such provisions are incorporated into Section 697, they do not apply to the acts charged in the indictment. Mere incorporation is not enough; the incorporated provisions, to be effective, must prohibit and make punishable the particular acts charged in the indictment. (App. Op. Br. pp. 16-21.) Most of the remainder of the Government's Brief is devoted to the questions (a) whether the evidence is sufficient to support the conviction, and (b) whether the probationary conditions imposed by the sentence are valid.

ARGUMENT.

I.

The Indictment Does Not Charge a Punishable Offense Against the United States.

Each count of the indictment in this case charges the defendant with causing the Bank of America to make a false "certificate or paper" to the Veterans Administration, in that the price charged and received by her for the lot sold to the veteran did not exceed the appraised value thereof.

If the act charged in each count of the indictment is a punishable offense against the United States, it must be such because of the provisions of Section 715 of Title 38, U. S. C. A. There is no other federal statute prohibiting the acts charged. Moreover, Section 715, to be applicable, must have been validly incorporated by reference into Section 697.

A. Section 715 Is Not Incorporated into Section 697.

We shall not repeat the argument on this point, made at pages 16-21 of the Opening Brief. The Government recognizes the fatal weakness of its case, by saying (Gov't Br. p. 19):

> "It is the Government's contention that Section 715 is incorporated into the Servicemen's Readjustment Act, and that in practical effect this incorporation makes Section 715 read 'concerning any claims for benefits under the Servicemen's Readjustment Act of 1944.' It would have been better had Congress so expressly amended the statute . . ."

In other words, the Government suggests that this Court "in practical effect," read into Section 715 provisions that Congress wholly failed to make for any valid incorporation of that section into Section 697, passed eleven years later. But, this is not a proper judicial function.

> "In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions." (*United States v. Evans,* 333 U. S. 483, 486.)

To the same effect are:

> *United States v. Hudson and Goodwin,* 7 Cranch 32, 3 L. Ed. 259;
>
> *United States v. Britton,* 108 U. S. 199;
>
> *United States v. Eaton,* 144 U. S. 677;
>
> *Vierick v. United States,* 318 U. S. 241, 243, 244.

In the *Evans* case, *supra,* the Court concluded (333 U. S. 495):

> "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law."

The Supreme Court might well have added:

> "A statutory offense cannot be established by implication and there can be no constructive offense. Before an accused can be punished, his act must *plainly* be within the statute." (*Arnold v. United States,* 115 F. 2d 526.)

B. Even if Section 715 Had Been Validly Incorporated Into Section 697, the Acts Charged in the Indictment Are Not Made Punishable Offenses Against the United States.

Standing alone, Section 697 of Title 38, U. S. C. A., neither creates an offense against the United States nor provides a penalty or punishment for any offense against the United States. Together with Sections 694, 694a and 694d of said Title, it relates to matters of a civil nature.

Standing alone, Section 715 of Title 38, U. S. C. A., does not include, or in any wise refer to, the acts charged in the indictment in this case.

By some hocus-pocus of interpretation counsel for appellee suggest reading into Section 715 what is not there; and then after that is done, to incorporate said Section, as revised and changed to suit their present needs, into Section 697.

Appellee's Brief shows the weakness of this position in the following language (p. 20):

> "One difficulty raised in the present case is that Section 715 is limited on its face to claims for benefits under specific statutes, and this enumeration does not include the Servicemen's Readjustment Act of 1944, which was enacted eleven years later."

It is also limited to specific offenses, for which punishment is provided. These do not include the offenses charged in the indictment.

On page 19 of Appellee's Brief there appears other language showing the weakness of appellee's position:

> ". . . it should be noted that Section 715, standing by itself, states a crime definitely enough. In essence it states a crime *similar* to that outlined in Section 80 of Title 18 (1946 Ed.), *but limits the*

crime to false statements concerning certain [entirely different and wholly unrelated] *claims for benefits.*" (Italics ours.)

It is true that Section 715 "states a crime (or crimes) definitely enough." But the crime stated or defined in Section 715 is not the offense charged in the indictment in this case.

There is an obvious hiatus between the crime or crimes defined and made punishable by Section 715 and the erroneously supposed crime charged in the indictment in the case at bar. This hiatus is not bridged or closed by Section 697, nor has appellee shown how it is or can be bridged or closed. Indeed, the Government offers nothing more than the suggestion that the Court read into Section 715 the provisions of an Act passed eleven years later, and then, as judicially amended and revised, make Section 715 apply to acts not previously included in or made punishable by said Section.

The criminal offenses defined and made punishable by Section 715 are the following:

(1) Making, or causing to be made a false statement in an application for a veteran's pension (Sec. 701, Title 38, U. S. C. A.);

(2) Making, or causing to be made, a false statement for the domiciliary care or hospital treatment of a veteran (Sec. 706);

(3) Making, or causing to be made, a false statement for retired officer's disability pay (Sec. 710);

(4) For receiving a veteran's pension, the right to which has ceased (Sec. 713); and

(5) For receiving a veteran's pension without being entitled thereto (Sec. 714).

The five foregoing offenses are *all* of the offenses defined and made punishable by Section 715. If these five offenses are legally incorporated by reference into Section 697, nothing penal is thereby added to Section 715. Section 715 has never prohibited or penalized the acts charged in the indictment. Section 697 does not prohibit, and certainly does not penalize, the acts charged. For the acts charged there is no penalty in either of said Sections. The result is the same as if naught is added to naught: we still have naught.

Appellee contends that Congress clearly intended to make Section 715 apply to the Servicemen's Readjustment Act. This, we deny. But if Congress did so intend, that alone is insufficient; it must go further, and express such intent in clear and unequivocal language. This it has not done.

Vierick v. United States, 318 U. S. 236;

United States v. Evans, 333 U. S. 483.

See, also cases cited in Opening Brief, page 14.

Federal statutory offenses are never implied. The federal decisions emphatically state that no act is punishable as a crime, unless it is plainly denounced *and made punishable by the plain and unambiguous language of a statute.*

United States v. Resnick, 299 U. S. 207;

Donnelley v. United States, 276 U. S. 505;

Lanzetta v. New Jersey, 306 U. S. 451;

First Nat'l Bk. v. United States, 206 Fed. 374 (8 Cir.);

Arnold v. United States, 115 F. 2d 523, 526;

United States v. Weitzel, 246 U. S. 533, 543.

> "To supply omissions (in a statute) transcends the judicial function." (*Iselin v. United States,* 270 U. S. 245, 251.)

In *United States v. Evans,* 333 U. S. 483, *supra,* the defendant was indicted for concealing and harboring five aliens under Section 144 of Title 8, U. S. C. A. The District Court rendered judgment dismissing the indictment and the Supreme Court affirmed the judgment. The Government, as here, contended that Congress intended not only to denounce the acts mentioned but also to provide punishment therefor. Section 144 of Title 8, U. S. C. A., provides in part:

> "That any person . . . who shall bring into or land in the United States (or shall attempt to do so) *or shall conceal or harbor,* in any place . . . any alien not duly admitted by an immigration inspector or not lawfully entitled to enter or to reside within the United States, under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years *for each and every alien so landed or brought in or attempted to be brought in.*" (Italics ours.)

The statute clearly denounces as an offense against the United States the concealing or harboring of an alien, as well as bringing or landing an alien within the United States. But, the penalty extends only to bringing or landing an alien within the United States. In respect to the contention of the Government that the Act clearly shows the intent of Congress to penalize the act of con-

cealing or harboring, the Supreme Court said (333 U. S. 485):

> "Before discussing specifically the alternatives, we note that the Government rests primarily on the clarity with which Section 8 indicates Congress' purpose to make concealing and harboring criminal rather than upon any like indication of legislative intent concerning the penalty. Because the purpose to proscribe the conduct is clear, it is said, we should not allow that purpose to fail because of ambiguity concerning the penalty. Rather we are asked to make it effective by applying that one of the possibilities which seems most nearly to accord with the criminal proscription and the terms of the penalizing provision . . .
>
> "The position the Government asks us to take involves therefore a major task in two respects, not merely one. The first is to expand the penal language beyond the explicit limitation 'for each and every alien so brought in,' so as to apply the penalties designed for smuggling to all offenses covered by the section. The second is to do this blindly in reference to the scope and quality of the forbidden acts to which the extension is to be made . . . We are not willing to undertake extension of the penalty provision blindfold, without knowledge in advance to what acts the penalties may be applied." (*Id.* p. 490) . . .
>
> "This is a task outside the bounds of judicial interpretation." (*Id.* p. 495.)

The *Evans* case, *supra,* was far more favorable to the Government than is the case at bar. There, the alleged offense was clearly denounced by the statute; here, it is not. There, the statutory proscription was clearly intended by Congress, as evidence by the words "shall be deemed guilty of a misdemeanor"; here, neither Section

715, nor Section 697, shows any intention to proscribe the act of causing the lender to make a false certificate or paper to the Veterans Administration. There, the penalty provided was held not to apply to the act of concealing or harboring an alien; here, neither Section 715, nor Section 697 prescribes or even remotely refers to a penalty for the act of causing the lender to make a false certificate or paper to the Veterans Administration.

In essence, the Government asks the Court to supply both proscription of the act here charged and punishment therefor. "That is essentially the sort of judgment legislatures rather than courts should make." (*United States v. Evans, supra,* p. 450.)

C. The District Court Decisions Cited by Appellee Are Neither Persuasive nor Controlling in This Case.

The Government cites only two cases on the point that Section 697 of Title 38, U. S. C. A., proscribes and penalizes the acts charged in the indictments in this case, namely, *United States v. Oakland,* 81 Fed. Supp. 343 (W. D., La.), and *United States v. Selph,* 82 Fed. Supp. 56 (S. D., Calif.).

With all possible deference to the two Judges who prepared the opinions in those cases, their opinions are neither persuasive nor controlling.

The decisions of District Courts, even though persuasive in their reasoning, are not binding on each other, much less upon Courts of Appeal.

Northern Pac. R. Co. v. Sanders, 47 Fed. 604, affirmed 166 U. S. 620;

In re Madonia, 32 Fed. Supp. 165;

Fosgate Co. v. Kirkland, 19 Fed. Supp. 152;

Continental Securities Co. v. Interborough Rapid Tr. Co., 165 Fed. 945.

Comity does not extend further than that a decision by one District Judge should not be re-examined by another Judge in the same district. For cogent reasons, it may not even then be followed.

Long v. Dick, 38 Fed. Supp. 214;
Continental Baking Co. v. Woodring, 55 F. 2d 347, affirmed 286 U. S. 352.

In *United States v. Oakland, supra,* Judge Dawkins merely assumed that the penal provisions of Section 715 had been validly incorporated into Section 697. He then, without stating any reasons, said:

> "It is not believed necessary to discuss . . . the question of the adoption of earlier statutes by subsequent acts of Congress. It suffices to say that I believe there can be no confusion or doubt about the applicability of the law in the manner stated in the present case." (*Id.* p. 345.)

In the *Selph* case, Judge Yankwich said in his written opinion:

> "Section 715 . . . punishes both him who knowingly makes or causes to be made, and him who aids or assists in, or procures the making or presentation of, the false or fraudulent statement or writing denounced. Section 697 makes the section applicable to claims under the Servicemen's Readjustment Act of 1944 . . ."

There is no analysis of Section 715, nor of Section 697. Certainly, the acts charged in the indictments in this case are not denounced by Section 715, nor are they denounced by Section 697. This fact appears to be overlooked in both opinions in the above cases. Moreover, only by reading into the two sections something that Congress did not include in them could the Courts reach their respective conclusions. These are not binding here.

II.

The Evidence Does Not Support the Verdict and Judgment.

The Government's Brief states, in substance, that appellant caused the Bank of America to make false certificates to the Veterans Administration by means of double escrows, and that "their true purpose was to deceive." (Gov't Br. p. 29.) This statement is of the same pattern as another found at page 13, *i. e.*, "To be blunt, the crime is not overcharging, but lying." These statements are not supported by, but are contrary to, the evidence. It is both easy, and safe, for counsel to call a woman a liar; but they have miserably failed to back up the statement.

A. Appellant Made No False Statements.

Appellant told each veteran the exact price he was being charged for the lot sold him. No "lying" there. She delivered to the Pico-LaCienega Branch of the Bank of America two sets of escrow instructions in each sale, one of which plainly showed on its face the exact price paid by the veteran for the lot sold him. No "lying" to the Bank. Appellant made no statements to the Veterans Administration concerning any of the lots sold by her. No "lying" there. The Government has not told the Court of a single false statement made by appellant to a veteran, or to the Bank, or to the Government. Nevertheless it has the effrontery to brand her a liar.

B. The Bank of America Was Not Deceived by Appellant; It Had Full Knowledge of the True Price Paid by Each Veteran for His Lot.

The Government insists that appellant deceived the Bank as to the prices paid by veterans for the lots sold them by appellant. Nothing could be further from the truth. Nevertheless, it was able to incline both the jury and the trial court to this false view of the case. It is high time to expose the utter fallacy of the Government's contention.

The Government's own testimony shows the following pertinent facts: (1) that in each sale, except one, of a lot to a veteran two sets of escrow instructions were filed with the Bank; (2) *that one of said sets of instructions plainly showed the exact and true price paid by the veteran for his lot;* (3) that the Pico-LaCienega Branch of the Bank, where both sets of instructions were deposited and filed, forwarded only one of these sets of instructions to the Santa Monica Branch, and that the set so forwarded was not the one showing the exact and true price paid for the lot; and (4) that the Santa Monica Branch made the false certificate to the Veterans Administration.

At the trial the District Judge exposed the fallacy of the Government's contention that the Bank did not have knowledge of the exact and true prices paid for lots. He engaged Government counsel in a running colloquy, which, in part, is set out at pages 29-32 of Appellant's Opening Brief. There, as here, the Government argued in effect that, because the Pico-LaCienega Branch did not forward to the Santa Monica Branch the escrow instructions showing the exact and true price paid for each lot, therefore the Bank did not have knowledge thereof. At pages 28-29

of its brief the Government repeats this moth-eaten argument. In the colloquy referred to the following appears:

> "Mr. Fitting: * * * She rigged the transaction so that it would appear they fall within the law.
>
> The Court: Appear to whom?
>
> Mr. Fitting: So that the paper would come to the certifying branch, the Santa Monica Branch—
>
> The Court: But, Mr. Fitting, you have to start with the assumption that the Bank is one entity and that everything an agent knows the Bank knows. * * * So what the manager of the Pico-LaCienega Branch of the Bank of America knew, the Bank knew, did it not; and what the manager of the Santa Monica Branch knew, the Bank knew, did it not?
>
> Mr. Fitting: Yes.
>
> The Court: Now, you can argue practicalities, you can argue as a practical matter that it may not have known, but, as a matter of law, the law charges the bank with knowledge, doesn't it?
>
> Mr. Fitting: That is right." [R. p. 413.]

If, as the Government says, "these papers never reached the Santa Monica branch" (Gov't Br. pp. 31-32), whose fault was it? There can be but one answer: it was the sole fault of the Pico-LaCienega Branch of the Bank. Is appellant to be convicted and sentenced because of the sole fault of the Bank? If so, a new doctrine must be read into the law. Such a doctrine, we submit, is monstrous.

The indictments in this case allege specifically that appellant caused the Bank to make false certificates that prices paid for lots did not exceed the reasonable (appraised) values thereof, "whereas, as defendant well knew

and *concealed* from said Bank and Veterans Administration" said prices did exceed such reasonable values. "Concealment" from the Bank was emphasized, over and over, at the trial; it was hammered home to the jury; it was argued extensively; it is now urgued upon this Court; it is the chief reliance of the Government, without which no conviction could possibly be sustained.

But, appellant concealed *nothing* from the Bank. The exact and true price she charged and collected from each veteran for the lot sold him is shown by a duly signed and executed typewritten document filed with the Bank. Is appellant to be convicted and punished because the Bank ignored this documentary evidence?

The Government says that the true purpose of double escrows is to deceive. (Gov't Br. p. 29.) It may be remarked that double escrows are often used in consummating purchases of, or trades for, real property. *Per se,* they are neither illegal, nor improper. In many cases such escrows are absolutely necessary. To impute a fraudulent purpose to them would be to denounce a common and well recognized trade practice.

One thing more should be stated in this connection, *i.e.,* the Government's contention that appellant knew the amounts of the lot appraisals at the times she made respective sales thereof, and that she "rigged the transactions" accordingly. The contention is baseless, and contrary to the evidence.

The testimony of Robert E. Gilliland, appraiser for the Veterans Administration, shows that his appraisal of each lot sold by appellant to a veteran was made *after* the escrow instructions were deposited in the Bank of America. At that time the contract between appellant

and the veteran was, and for some days had been, executed. Mr. Gilliland testified [R. pp. 354-355]:

> "In most cases, the bank, the loaning institution, would merely call up and say that the appraiser had been designated as the appraiser of that property (lot). However, at that particular time that was not the practice then. At that time the bank or the builder, either one, could call up any approved Veterans Administration appraiser and tell him they had some appraisal for. However, my authorization on all of these cases came through the Bank of America at Santa Monica."

The foregoing, and other evidence in the record, shows that each lot sold by appellant was appraised *after* the trade was closed between her and a veteran and *after* both sets of escrow instructions were deposited with the Pico-LaCienega Branch of the Bank of America. Just how appellant could know in advance of an appraisal and the amount thereof is not, and cannot be, explained by the Government.

The record in this case shows that the Bank of America had actual knowledge, or that it is legally chargeable with knowledge, of the exact and true amount paid by each of the veterans involved for the lot sold him.

The Government, however, tries to avoid the effect of the undisputed fact by saying (Gov't Br. p. 28):

> "It was customary practice for the bank to base its certificate as to the lot price on the documentary evidence furnished it—*i.e.,* the escrow statements covering the lots forwarded to Santa Monica (Branch) by Pico-LaCienega (Branch)."

Apparently, the Government would have this Court believe that appellant had knowledge of the alleged practice of the Bank, and that in some way she manipulated the escrow instructions so that only one set thereof would be forwarded by the Pico-LaCienega Branch to the Santa Monica Branch, following which the latter would innocently make a false certificate to the Veterans Administration. This argument is so transparently thin as to be not even nebulous.

There is no evidence at all in the record that shows, or even tends to show, that appellant had any knowledge of the practice of the Bank, as between its Branches, in respect to handling escrows; and even less evidence, if possible, that appellant had anything to do with the alleged practice of the Pico-LaCienega Branch in forwarding only one of the two sets of escrow instructions to the Santa Monica Branch.

The Government would have this Court believe that appellant could, and did, manipulate the affairs of the Bank of America in respect to the business carried on by and between its Branches; and that by reason of the imagined manipulation appellant deceived and thereby caused the Santa Monica Branch to make false certificates to the Veterans Administration.

Who is responsible for the procedures and practices set up for the Bank and its Branches? Certainly not the appellant. To say that she could have the slightest influence in respect to such practices and procedures is pure nonsense.

If the Santa Monica Branch (the certifying Branch) of the Bank was deceived in respect to the prices paid by the veterans for their lots, who deceived it? One answer only is possible, *i. e.,* the Pico-LaCienega Branch, by failing to transmit the set of escrow instructions to the Santa Monica Branch showing the exact and true price paid by each veteran for his lot. Is appellant to be punished for the neglect and omissions of the Pico-LaCienega Branch? Or, otherwise put, is appellant to be punished for the deception practiced by the Pico-LaCienega Branch upon its sister Branch?

Government counsel appear to have forgotten their admissions in the running colloquy between them and the District Judge. Under the Court's searching questions, they were forced to admit (1) that they no longer questioned that the Bank knowingly made false certificates to the Veterans Administration [R. p. 418, lines 4-25], and (2) that the law charges the Bank with knowledge of what is done, or known, by each of its Branches [R. pp. 413-414]. These admissions followed the quaint but revealing statement of the District Judge that "The right hand has to know what the left hand is doing," and "The law requires that every man knows what both his hands are doing." [R. p. 409.]

III.

The Probationary Requirements of the Sentence Are Invalid.

The Court ordered appellant to pay sums aggregating $4200 to, or for the account of, twelve persons because of offenses for which no convictions were had. The Court had no more authority to do this than to impose *fines* for offenses for which no convictions were had.

The Court's authority to place a defendant under sentence on probation, and limitations on such authority, must be found in statute. (*Trant v. United States,* 90 F. 2d 718, 719.)

The statute (18 U. S. C. A. Section 3651, formerly Section 724 of that Title) limits restitution or reparation "to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." Two things must exist and concur before the Court may require restitution: (1) an aggrieved party must have suffered *actual* damages or loss; and (2) the defendant must have been convicted of an offense connected with such loss or damages.

A. The Government Failed to Show That Any of the Seventeen Veterans Suffered Damages or Loss.

Appellant was charged in the indictment with seventeen offenses. She was convicted of six thereof.

The record has not one word of evidence to show that any of the seventeen veterans suffered one cent of loss or damage by reason of their purchases of lots, or by reason of their respective investments in both lots and houses. Hence, one of the two statutory prerequisites is lacking as to each of said seventeen veterans.

B. No Convictions Were Had for Eleven of the Seventeen Offenses Charged in the Indictment.

The Court, either on motion of the Government or of appellant, dismissed eleven of the seventeen counts in the indictment. Therefore, no convictions were had in respect to the offenses charged in those eleven counts.

Thus, as to the eleven offenses mentioned, both statutory prerequisites to a valid order of restitution are lacking.

So far as we can ascertain, after diligent and extensive research, there is no reported decision squarely in point, due no doubt to the clarity of the statute.

In *United States v. Berger,* 145 F. 2d 888, cited at page 35 of the Government's Brief, the Court indicated approval of the view here expressed, saying at page 891:

> "Clearly the court could make reparation for *losses caused by the offense* for which conviction was had a condition of probation *provided there were such losses.*" (Italics ours.)

In all respects the decision wholly fails to sustain the Government's contention here. The overtime wages involved in the *Berger* case, *supra,* were expressly held to constitute losses of the interested employees, and convictions were had.

In *United States v. Follette,* 32 Fed. Supp. 953 (Circuit Judge Maris presiding), also cited by the Government (p. 35), it was said, at page 954:

> "The power of federal courts to suspend the execution of sentence and admit a defendant to probation is conferred by the federal probation Act. It will be seen from the last paragraph of section 1 of the act, 18 U. S. C. A., Section 724, that when restitution is made a condition of probation it may *only* be ordered

> to be made to an 'aggrieved party' and 'for actual damages or loss caused by the offense for which conviction was had.' Although the first paragraph of the section authorizes the courts to place defendants on probation 'upon such terms and conditions as they may deem best,' I think it clear that this general language is limited by the later specific provision so far as restitution is concerned."

The District Court erred in ordering restitution to any of the seventeen veterans, because no damages or loss were shown to have been sustained by any of them. The Court further erred in ordering restitution to eleven of said veterans, because no convictions were had for the offenses charged in respect to them. And the Court patently erred in ordering restitution to Stein who was not even mentioned in the indictment.

Conclusion.

For the reasons stated in the Opening Brief and in this brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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